

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROSA E. GALLEGO	:	DETERMINATION
	:	DTA NO. 819528
for Redetermination of a Deficiency or for Refund of	:	
New York State Personal Income Tax under Article 22	:	
of the Tax Law for the Year 2001.	:	

Petitioner, Rosa E. Gallego, 63-11 Booth Street, Rego Park, New York 11374, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 2001.

A small claims hearing was held before Brian L. Friedman, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 26, 2004 at 1:15 P.M., with additional evidence to be submitted by September 1, 2004, which date began the three-month period for the issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Sandra Kahn).

ISSUE

Whether the Division of Taxation properly disallowed petitioner's claimed earned income credit of \$1,002.00 on the basis that she failed to substantiate that she had received earned income or the amount thereof during the tax year at issue.

FINDINGS OF FACT

1. Petitioner, Rosa E. Gallego, filed a timely New York State resident personal income tax return for 2001 whereon she claimed the filing status "head of household." Other than a State

income tax refund of \$800.00, the only item of income claimed on the return was \$12,000.00 in business income. Petitioner's return claimed a refund of \$1,065.00 which amount included a \$63.00 City of New York school tax credit and a New York State earned income credit of \$1,002.00. Petitioner did not prepare her own return, but retained the services of one Emiliano Perez of Jackson Heights, New York.

2. Attached to petitioner's Federal income tax return for the year 2000 was a Schedule C-EZ on which petitioner indicated that her principal business or profession was "SALES JEWELRY." Her business address was the same as her home address, 63-11 Booth Street, Rego Park, New York 11374. Petitioner's Schedule C reported gross receipts in the amount of \$12,000.00, and since no expenses were claimed, her net profit was the same as reported gross receipts.

3. On her Federal Schedule EIC, Earned Income Credit, petitioner indicated that her qualifying children were her daughter, July P. Gallego, born in 1974, and her grandchild, Kevin Carpintero, born in 1995, and further indicated that both lived with her for the entire year. The same two qualifying children were also claimed on petitioner's State form IT-215, Claim for Earned Income Credit. On the form IT-215, petitioner indicated that the amount of Federal earned income credit claimed was \$4,008.00 and that her claimed New York State earned income credit was \$1,002.00.

4. By letter dated April 12, 2002, petitioner was advised by the Division of Taxation ("Division") that her income tax return for 2001 had been selected for review. The letter stated that certain additional information was needed to process petitioner's claim for the earned income credit.

In response thereto, the Division received from petitioner on June 5, 2002, the following:

- a. a letter dated May 7, 2002 from Devisons Jewelers, G & N Jewelers, Inc. of Jackson Heights, New York which stated that petitioner was working on commission, helping to sell jewelry from their store and that her earnings were approximately \$12,000.00 gross;
- b. Social Security cards and birth certificates for her daughter and grandson, a verification of pupil registration for her grandson from the New York City Board of Education and hospital and doctor's records pertaining to petitioner's daughter; and
- c. Federal income tax return and schedules for the tax year 2001.

5. On August 2, 2002, the Division issued a Statement of Refund Adjustment to petitioner for the 2001 tax year reducing the claimed refund from \$1,065.00 to \$62.50. The Statement of Refund Adjustment contained the following explanation:

In order to qualify for the Earned Income Tax Credit and/or Dependent Care Credit, a taxpayer must be able to document that he received earned income during the tax year. In the case of business income, the taxpayer must be able to provide records which support when the income was earned, to whom services were provided, and the exact amount of compensation received from each transaction. Some examples of acceptable proof include: copies of your receipt booklet, pages from any ledgers you maintain, bank statements, paid receipts, canceled checks and/or invoices. Based on this, estimated figures of earnings received during the tax year cannot be used in establishing a claim for either credit. Therefore, your Earned Income Credit and/or Dependent Care Credit have been disallowed.

You have been allowed the City of New York school tax credit.

6. On September 24, 2002, the Division received from petitioner a series of letters from nine individuals who claimed to have purchased jewelry from petitioner during the year at issue. The items of jewelry allegedly purchased by these individuals totaled \$12,050.00.

7. On October 4, 2002, the Division issued a Notice of Disallowance to petitioner for the 2001 tax year disallowing, in full, her claim for the earned income tax credit stating, in pertinent part, as follows:

You submitted a letter from an employer for commissions of approximately \$12,000 and customer letters for \$12,050 in sales of jewelry. Your Schedule C-EZ shows gross receipts for \$12,000 and no expenses.

The business submitted with your response for your commission earnings cannot be verified.

The customer letters submitted with your response total \$12,050. No records were submitted to show the cost of sales or business expenses.

Therefore, we must deny your Earned Income Credit refund claim at this time and consider the matter closed.

8. At the hearing held herein, petitioner was given an additional 30 days, or until September 1, 2004, to provide documentation from the jewelry businesses from which she obtained the jewelry for sale to her customers to verify the amount of jewelry obtained from these businesses, the terms upon which she received the jewelry and the selling price for the various pieces of jewelry sold. No additional documentation was received from petitioner.

CONCLUSIONS OF LAW

A. As applicable to this proceeding, Tax Law § 606(d) provides that the New York State earned income credit for the 2001 tax year is equal to 25% “of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year” Since the State earned income credit is determined based solely on a percentage of the Federal credit, it is appropriate to refer to the provisions of the Internal Revenue Code and Federal case law to determine petitioner’s eligibility for the credit in this matter.

B. The Federal earned income credit, provided in section 32 of the Internal Revenue Code, is a refundable tax credit for eligible low-income workers. The credit is computed based on a percentage of a taxpayer’s “earned income” which includes, *inter alia*, earnings from self-employment. The only issue to be addressed herein is whether petitioner has sustained her

burden of proof pursuant to Tax Law § 689(e) to show that she in fact generated \$12,000.00 in earned income as a self-employed jewelry salesperson during the 2001 tax year.

C. Although it appears that petitioner was engaged in the sale of jewelry during the tax year in question, the evidence presented in this proceeding is clearly insufficient to establish the amount of income that she allegedly generated from these activities. While the company for whom petitioner allegedly sold jewelry has stated that her earnings were approximately \$12,000.00 for the year, petitioner has produced no documentation to show the amount of jewelry obtained from this company nor has she produced any receipts from this business for jewelry obtained therefrom. While the jewelry business states that petitioner worked on commission, there is no evidence as to how the commission was computed. Clearly, while petitioner has produced letters from purported customers which indicate that she sold approximately \$12,000.00 (the letters actually reflect sales of \$12,050.00), if she was working on commission, it is not reasonable to conclude that she received commissions totaling \$12,000.00 for sales in the same total amount. Petitioner has claimed no business expenses for jewelry purchases; she simply indicates that she had business income in the amount of \$12,000.00.

Since the earned income credit is computed based upon a percentage of a taxpayer's earned income, it is imperative that the amount of earned income be established in order to determine the taxpayer's allowable credit. In the present matter, petitioner has failed to substantiate the amount of earned income received in 2001 and, therefore, is not entitled to claim the earned income credit (*Blore v. Coom.*, 80 TCM 559).

D. The petition of Rosa E. Gallego is denied and the Division's Notice of Disallowance dated October 4, 2002 is sustained.

DATED: Troy, New York
November 24, 2004

/s/ Brian L. Friedman
PRESIDING OFFICER